Supreme Court of the United States

No. 71-1669 ~~, October Term, 19~~

James R. Gustafson,

Petitioner,

v.

Florida

Order allowing certiorari. Filed March 19, 19 73

The petition herein for a writ of certiorari to the Supreme Court of the State of Florida is granted, and case set for argument with No. 72-936.

71-1669

Supreme Court, U. S.
FILED
JUN 22 1972
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

JAMES E. GUSTAFSON,
Petitioner,

versus

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No.

JAMES E. GUSTAFSON,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, James E. Gustafson, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered on January 26, 1972, quashing an opinion rendered by the District Court of Appeal of Florida, Fourth District, on February 8, 1971. The opinion of the Fourth District Court of Appeal reversed a trial court order of probation and remanded the petitioner's case with directions that he be discharged from further prosecution.

OPINIONS BELOW

The opinion of the Supreme Court of Florida which the petitioner prays that this Court review is reported at 258 So.2d 1, and is set out in the Appendix to this petition. The decision of the District Court of Appeal of Florida, Fourth District, which was quashed by the

Florida Supreme Court's opinion is reported at 243 So. 2d 625. This opinion is also set out in the Appendix being filed with this petition.

JURISDICTION

The jurisdiction of this court is invoked under Section 1257(3), Title 28, United States Code.

QUESTION PRESENTED

Whether a police officer's stopping of a motorist on grounds of mere suspicion or curiosity authorizes an extensive search of the motorist's person and clothing after the officer, in response to routine questioning, is advised by the motorist that he does not have his valid vehicle operator's license with him.

CONSTITUTIONAL PROVISION INVOLVED

This case presents questions concerning the construction and interpretation of the Fourth Amendment to the United States Constitution which provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated. . . . "

STATEMENT OF THE CASE

The petitioner and a companion were returning to their college dormitory in the early morning hours of Sunday, January 12, 1969, after having taken their evening dates home. While the petitioner was driving his automobile through the city of Eau Gallie, Florida,

a municipal police officer on routine patrol observed the vehicle to weave slightly with the left wheels crossing into another traffic lane. The officer stopped the vehicle to "check it out" with no evidence of the actual commission of any traffic offense and with no intention of making an arrest.

Upon stopping the vehicle, the officer asked the petitioner for his driver's license. The petitioner informed the officer that he was a student and had left his driver's license in his dormitory room in the neighboring city of Melbourne, Florida. The petitioner was then arrested for failure to have his vehicle operator's license in possession.[1] The officer then undertook an extensive search of the petitioner's person and clothing and determined to place him in the patrol car to be taken to the police station. The petitioner's passenger, who had not been arrested for any offense, was also thoroughly searched and subsequently taken to the police station.

During the police officer's search, a cigarette package was removed from the petitioner's coat pocket and the police proceeded to examine its contents. This examination revealed the existence of several homemade cigarettes.

The petitioner was ultimately charged with the possession of three marijuana cigarettes and stood trial on this charge. Through timely motions to suppress, the petitioner challenged the legality of his arrest and the search and seizure of the tangible evidence which

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[1]Fla. Stat. §322.15 (1969)

formed the basis of the prosecution. His motions and objections were denied and he was found guilty of the possession charge. The trial judge entered an order of probation w.thholding adjudication of guilt and an appeal was taken.

The petitioner sought review of the trial court rulings in the District Court of Appeals of Florida, Fourth District. The Fourth District Court of Appeal held the search to be unreasonable under the circumstances since it was not related to the petitioner's arrest for a minor traffic charge and since it proceeded far beyond a mere custodial search limited to weapons or instrumentalities for escape. The order of probation was reversed and the case was remanded with directions to the trial court to discharge the petitioner from further prosecution on the charge. *Gustafson* v. *State*, 243 So.2d 615 (4th D.C.A. Fla.1971).

The State of Florida petitioned the Supreme Court of Florida for a writ of certiorari. The Florida Supreme Court took jurisdiction of the cause and subsequently quashed the opinion of the District Court of Appeal. *State* v. *Gustafson*, 258 So.2d 1 (Fla. 1972).

The decision of the Florida Supreme Court labeled the District Court's requirement that such searches be either related to the charge for which the arrest is made or limited to a search for weapons or instrumentalities for escape, to be an outright "reversal" or rejection of former Florida decisions, containing "reversionary views" contrary to an entire body of established law and a "radical departure" from established reasonable standards. The petitioner had con-

tended that this Court's decisions in *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and *Sibron* v. *New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) were clearly applicable to the search and seizure question in this case. The Florida Supreme Court, however, failed to even cite *Terry* or *Sibron* in the course of its opinion.

REASONS FOR GRANTING THE WRIT

The Fourth Amendment And This Court's Decisions In *TERRY V. OHIO*, 392 U. S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) And *SIBRON V. NEW YORK*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917 (1968) Prohibit The Conducting Of An Extensive Search Of A Motorist's Person And Clothing By A Police Officer Who Has Stopped The Motorist On Grounds Of Mere Suspicion Or Curiosity And Who Has Learned In Response To Routine Questioning That The Motorist Has Violated A Minor Traffic Regulation In Not Having His Motor Vehicle Operator's License In Possession While Driving.

The Fourth Amendment considerations and principles announced by this Court in *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) have, quite naturally, come into play in cases involving momentary questioning or detention of automobile drivers and passengers by law enforcement officials. See *United States* v. *Davis*, 441 F.2d 28 (9 Cir.1971); *Tinney* v. *Wilson*, 408 F.2d 912 (9 Cir.1969); *United States* v. *Gonzalez*, 319 F.Supp. 563 (D.Conn.1970) and *United States* v. *Robinson*, 447 F.2d 1215 (D.C.Cir.1971) reargued en banc on June 1, 1972.

In and of itself, an arrest for the usual minor traffic violation cannot support a subsequent search that is wholly unrelated in scope or purpose to the nature of the arrest. Ordinarily, there are no fruits or instrumentalities of these offenses. In such cases the "incidental to arrest" exception to the command of the Constitution is not present and, therefore, law enforcement searches of this nature are per se general and unreasonable. See *Amador-Gonzalez* v. *United States*, 391 F. 2d 308 (5 Cir.1969) and Annotation, Lawfulness of Search of Motor Vehicles following Arrest for Traffic Violations, 10 A.L.R.3d 314.

The question of whether any search at all may be conducted by a law enforcement official following a minor traffic arrest is dividing courts throughout the country. See *People* v. *Marsh*, 20 N.Y.2d 98, 281 N.Y.S. 2d 789 (N.Y.Ct. App. 1967); *State* v. *Curtis*, 190 N.W.2d 631 (Minn.1971); *People* v. *Weitzer*, 269 Cal.App.2d 274, 75 Cal.Rptr. 318 (Cal. 1st D.C.A.1969).[2]

Nevertheless, assuming that a limited search may be authorized, it is certainly clear that the scope and extent of the intrusion into the motorist's person and effects can be no broader than a search following the principles enunciated by this court in *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

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[2]During the course of the printing of this petition, counsel received word that the California Supreme Court has now rejected a previous appellate decision in *People* v. *Graves*, 263 Cal. App. 2d 719 70 Cal. Rptr. 509 (1968). California now requires that a pat-down search for weapons as a incident to a minor traffic arrest must be predicated upon specific facts or circumstances giving the officer reasonable grounds to believe that a weapon is secreted on the motorist's person. See *People* v. *Simon*, 11 Crl. 2231, _____, _____ Cal. App. _____, _____ (Cal. May, 1972).

In the instant case, the police officer had no cause to believe that he was dealing with an armed or dangerous criminal and there was certainly no indication that his safety and well-being required an extensive exploratory search. The petitioner and his companion had made no threatening gestures and they were perfectly cooperative with the officer in providing responses to his questions and requests. These facts by themselves negate the existence of grounds for believing that he is dealing with an armed or dangerous individual. See *United States* v. *Hostetter*, 295 F.Supp. 1312 (D.Del.1969).

The decision of the Florida Supreme Court in the instant case would authorize full-scale exploratory searches of motorists where a police officer admittedly has no probable cause for any arrest upon the formulation in the officer's mind of what that court calls "a reasonable suspicion" that the motorist is driving under the influence of a drug or beverage.[3] In light of the Florida Supreme Court's decision in this case, the Fourth Amendment protections available to

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[3]Although the Florida Supreme Court determined that this suspicion was present in the petitioner's case, it must be pointed out that the transcript of record in the case was never considered by that Court since it had never even been forwarded up from the District Court of Appeal. Only the legal arguments advanced in petitions and briefs filed by counsel for the State and petitioner and the opinion filed by the District Court of Appeal were presented to the Florida Supreme Court. The State had never contended that the police officer believed the petitioner to be intoxicated and, therefore, was searching for alcoholic beverages or drugs. The depositions and transcripts of testimony in the case are totally devoid of evidence to the effect that the petitioner exhibited any indications or manifestations of being under the influence of any drug or beverage.

motorists traveling on Florida's highways today have been diminished to such an extent that police intrusions into their persons and privacy need now only be governed by the "suspicion" standards applicable to border searches.

The Florida Supreme Court's decision in this case authorizes police conduct that can in no way be considered as being reasonable and allowable in the face of the Fourth Amendment's proscriptions. Consequently, this Court should grant certiorari in order to announce that the Fourth Amendment to the United States Constitution prohibits extensive exploratory searches which go beyond a mere pat-down for weapons or instrumentalities of escape in minor traffic offense cases when the officer has no reason to believe he is dealing with an armed or dangerous individual and where he has no grounds for believing that his safety or that of others is in danger.

CONCLUSION

In view of the vital importance of the question presented and the considerations set forth above, we respectfully submit that this petition for writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of June, 1972, copies of this Petition for Writ of Certiorari were mailed, to the Honorable Robert L. Shevin, Attorney General of the State of Florida at Tallahassee, Florida, and to the Honorable Andrew Freidrich, Assistant Attorney General, 225 Pan-American Building, West Palm Beach, Florida 33401. I further certify that all parties required to be served have been served.

MICHAEL F. CYCMANICK

CERTIFICATE OF ATTORNEY

I, MICHAEL F. CYCMANICK, hereby certify that I am a member of the Bar of the United States Supreme Court in good standing and was admitted to practice by the Court on February 22, 1972.

MICHAEL F. CYCMANICK
Attorney

APPENDIX

State v. Gustafson, 258 So. 2d 1 (Fla. 1972)

STATE of Florida, Petitioner,

v.

James E. GUSTAFSON, Respondent.

No. 40808.

Supreme Court of Florida.

Jan. 28, 1972.

The Court of Record for Brevard unty, Joe A. Cowart, Jr., J., entered or- r imposing probation without adjudica- n of guilt on charge of unlawful pos- sion of marijuana, and defendant ap- led. The District Court of Appeal, on, C. J., 243 So.2d 615, reversed and anded, and State brought certiorari. e Supreme Court, Dekle, J., held that sonable suspicion that automobile driver s intoxicated not only justified stopping automobile but also justified searching intoxicants or drugs, and that a search ich reasonably ensues after a legal ar- t is proper, without regard to whether re is nexus between offense in question object sought.

Opinion of District Court of Appeal shed in part.

Ervin and McCain, JJ., dissented.

vays and Narcotics ⇐183

violating Liquors ⇐247

Reasonable suspicion that automobile r was intoxicated not only justified stopping the automobile but also justified searching for intoxicants or drugs. U.S. C.A.Const. Amend. 4; F.S.A.Const. art. 1, § 9; F.S.A. § 317.201.

2. Automobiles ⇐349

In routine stopping of a motorist by an officer, as for failure to yield right-of-way, in which traffic citation may be issued, reason for general search does not arise, and none would be authorized.

3. Arrest ⇐71.1(2)

Search which reasonably ensues after a legal arrest is proper, without regard to whether there is nexus between offense in question and object sought. U.S.C.A. Const. Amend. 4; F.S.A.Const. art. 1, § 9; F.S.A. § 901.21.

Robert L. Shevin, Atty. Gen., and Charles W. Musgrove, Asst. Atty. Gen., for petitioner.

Michael F. Cycmanick of the Law Offices of James M. Russ, Orlando, for respondent.

DEKLE, Justice.

Petition for certiorari is before us in this cause asserting conflict with Farmer v. State, 208 So.2d 266 (3rd DCA Fla. 1968), and Smith v. State, 155 So.2d 826 (2nd DCA Fla.1963), regarding the question of proper search and seizure. We find conflict which vests jurisdiction under

Fla.Const. art. V, § 4, F.S.A., to review the Fourth District Court opinion at 243 So.2d 615 (1971).

The catalyst for the extensive district opinion is a traffic incident occurring about 1:30 a. m. in the early Sunday morning hours in the town of Eau Gallie on Florida's lower east coast. An automobile driven by appellant and bearing out-of-state license plates was observed by a city police officer to be weaving across the line into another traffic lane. The officer stopped the vehicle "to find out why he had been driving that way, if he had been drinking or something." Upon the officer routinely asking for his driver's license, the appellant informed him that he had left it in his dormitory room at the adjoining town of Melbourne. He was thereupon arrested for failing to have a driver's license pursuant to statute.[1]

At this point when appellant was under arrest, the officer searched him and in a cigarette package taken from appellant's pocket he observed several homemade cigarettes. They turned out to be marijuana. Appellant was then charged with possession of marijuana under the statute.[2]

At a non-jury trial on the charge of unlawful possession of marijuana, the trial judge withheld adjudication of guilt and placed appellant on probation. The Fourth District Court reversed and held this to be an improper search and seizure and so not allowable in evidence, thus precluding any conviction. The court cited the Fourth Amendment to the United States Constitution and Section 12 of the Florida Declaration of Rights securing the people against unreasonable searches and seizures.

The district court's opinion is commendable in its research and treatment of the questions involved and while we uphold the opinion in its basic findings on the questions (1) that the initial stop and detention are reasonable under the circumstances and thus proper under the Fourth Amendment; (2) that the officer had authority to take appellant into custody for failure to have a driver's license in his possession and to arrest him for it; (3) that the officer had authority to search appellant's person instant to such arrest for a minor traffic violation; we reverse on the court's principal holding that the evidence should have been suppressed as the product of an illegal search and seizure in these circumstances.

[1] A reasonable suspicion (which was present here) that the driver was intoxicated not only justified stopping the vehicle, but also justified searching for intoxicants *or drugs*, inasmuch as our statute makes the influence of either an offense.[3] In today's proliferation of illegal drug use which affects the faculties, checking only for liquors is no longer adequate. The new and devastating use of various drugs in myriad forms (unhappily by drivers in dangerous instrumentalities) imposes the further duty upon the alert police officer to examine as well for such drugs in their various forms. Statistics are now reporting that 1 in 5 fatal traffic accidents involve the use of intoxicants or drugs. Finding the marijuana cigarettes in the natural place of a cigarette package is no different than finding liquor in a liquor bottle. It is no less a proper search and seizure.

The district court opinion criticizes the appellate decisions of this state, including those of this Court and of other district courts initially set forth above for conflict, as being in error in asserting the test for reasonableness for search as being what it describes as "merely a determination of whether the search was incident to a law-

1. Fla.Stat. § 322.15, F.S.A.

2. Fla.Stat. § 398.01 et seq., F.S.A.

3. Fla.Stat. § 317.201, F.S.A. Includes: ". . . under the influence of alcoholic beverages, narcotic drugs, barbiturates or control nervous system stimulants. . . ."

ful arrest," citing this court's opinions in Italiano v. State, 141 Fla. 249, 193 So. 48 (1940), and Self v. State, 98 So.2d 333 (Fla.1957). Our opinions are then described as "applying a categorical test of whether a lawful arrest preceded the search with little or no indication that other relevant circumstances were taken into consideration."

The district court then states:

"We will not compound the error nor blindly follow the categorical rule that a search incident to *any* arrest for the commission of *any* crime is lawful under the fourth amendment of the United States Constitution and Florida's Declaration of Rights."

The district opinion is an outright "reversal" (rejection) of our former decisions on the test for reasonable search and seizure. We expressly reverse the district opinion in such respect.

It has been the holding of the authorities through the years that once a proper arrest is made and the defendant is in custody that a reasonable search may then proceed and if evidence be then discovered reflecting that a crime has been committed or is being committed, the evidence is proper and admissible. This has included contraband upon search of a vehicle on probable cause (Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925)[4]; search of the person and immediate surroundings as an incident to arrest (Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)); and the "plain sight" exception of property which is apparent to the officer after reasonable cause for stopping the defendant (Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927); State v. Ashby, 245 So.2d 225 (Fla.1971)).

In Smith v. State, *supra* (relied on for conflict), lottery paraphernalia was found in the defendant's pocket during an arrest for operating a vehicle without a driver's license (the same arrest as here and the evidence was in plain sight upon "pat down" incident to taking into custody). It was also held to be a reasonable search, properly incident to the arrest, and the use of evidence discovered was held to be proper in Farmer v. State, *supra*, where marijuana was found in a match box after an arrest for public drunkenness.[5] Fla.Stat. § 901.21, F.S.A. (1970) also supports such search.

[2] In the routine stopping of a motorist by an officer, as for a "failure to yield right of way", etc., where a traffic citation may be issued, there does not arise any reason for a general search and none would be authorized. This is consistent with the authorities against unreasonable search where there is no occasion for it. These include the line of cases represented by Graham v. State, 60 So.2d 186 (Fla. 1952), holding some incidental searches to be unreasonable and therefore improper, where a person is stopped in a vehicle "only as a pretext for a warrantless search." These are indeed exploratory and not truly incident to arrest since the search is the primary purpose of the arrest. Riddlehoover v. State, 198 So.2d 651 (3d DCA Fla.1967); Chapman v. State, 158 So.2d 578 (3d DCA Fla.1963).

The district court turns to Illinois for a different view than that which has been established in Florida. The opinion quotes from People v. Watkins, 19 Ill.2d 11, 166

4. Fla.Stat. § 933.19, F.S.A. literally adopts the opinion of the Court in Carroll *by* express reference, the only such time to our knowledge that this has been done.

5. See also, Fletcher v. State, 65 So.2d 845 (Fla.1953); Gibson v. State, 180 So.2d 685 (3d DCA Fla.1965); Chippas v. State, 180 So.2d 355 (3d DCA Fla. 1965); Gray v. State, 177 So.2d 868 (3d DCA Fla.1965); Lyons v. Town of Lake Park, 153 So.2d 21 (2d DCA Fla. 1963); Cameron v. State, 112 So.2d 864 (1st DCA Fla.1960); Boseman v. State, 102 So.2d 648 (2d DCA Fla.1958).

N.E.2d 433 (1960), and some of the federal courts, citing the 9th Circuit in Jack v. United States, 387 F.2d 471 (1967). There the narrow test is applied that in any incidental search upon arrest "it must . . . relate[s] to *the* crime for which the *arrest* is made . . . and not to some other charge . . . ." (emphasis ours)

The district court opinion poses the query: "May the search be for evidence of any crime, or is it limited to fruits of the crime *for which the person was arrested?*" (emphasis ours) The district's answer would restrict the search to that relating to the *particular* crime for which the actual arrest was made. It would even limit the search after arrest "to a search for *weapons*, which normally entails only 'patting down' the suspect." Further on, the opinion would limit custodial search "to weapons and instrumentalities for escape." This is contrary not only to all Florida authorities as cited above but actually would be in derogation of the statute, section 901.21.

[3] We reject these reversionary views as contrary to the entire body of established law which has been built up in this area and which permits proper incidental search that *reasonably* ensues after a legal arrest, in accordance with the foregoing authorities which we have set forth and in accordance with our Fla.Stat. § 902.21, F.S.A. This is no time for a retreat in the law when modern methods are demanded by accelerating criminal activity.

Neither do we subscribe to the district opinion's conclusions that generally in traffic arrest situations "there are no fruits or instrumentalities of the crimes"; nor with the assertion that "most searches [and seizures] following an arrest for a traffic violation will undoubtedly be improper" and so prohibited by the Fourth Amendment.

The district court describes its own position as being "This more restrictive interpretation of the proper scope of a search incident to arrest" and introduces the new and narrow test that:

> "There must be a nexus between the offense and the object sought for a search conducted in connection with an arrest to be truly *incident* to it."

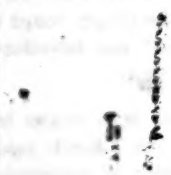
We cannot condone this radical departure from established, reasonable standards. We adhere to the former decisions of this state on the subject earlier recited.

The district court's opinion is accordingly quashed except as expressed herein.

It is so ordered.

ROBERTS, C. J., and CARLTON, ADKINS and BOYD, JJ., concur.

ERVIN and McCAIN, JJ., dissent.



possession of marijuana. The District Court of Appeal, Cross, C. J., held that although officer had reasonable grounds for stopping defendant's automobile to determine if defendant was driving while intoxicated and to arrest defendant for failure to have driver's license in his possession, there could be no valid search as an incident to the arrest, and although officer had right to conduct search of defendant's person for officer's protection and to prevent escape, officer exceeded scope of custodial search in removing cigarette package from defendant's coat pocket and inspecting the contents.

Reversed and remanded with directions.

Reed, J., concurred in conclusion.

1. Arrest ⇐68

An "arrest" is the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime. U.S. C.A.Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Arrest ⇐68

Elements required in an arrest are a purpose or intention to effect an arrest under a real or pretended authority; an actual or constructive seizure or detention of the person to be arrested by person having present power to control the person arrested; a communication by the arresting officer to the person whose arrest is sought of intention or purpose then and there to effect an arrest; and an understanding by

James E. GUSTAFSON, Appellant,

v.

STATE of Florida, Appellee.

No. 69-714.

District Court of Appeal of Florida, Fourth District.

Feb. 8, 1971.

Appeal from order of the Court of Record for Brevard County, Joe A. Cowart, Jr., J., imposing probation without adjudication of guilt on charge of unlawful

arises out of the transaction or occurrence that is the subject matter of the opposing party's claim * * *.

8. RCP 1.170(j). None of the limitations and restrictions to this rule appear to be applicable to the instant action. For such limitations and restrictions, see Davis v. Fiato, 210 So.2d 10 (Fla.App. 1968).

7. Section 51.011(1) Pleadings— * * * If the answer incorporates a counterclaim, plaintiff shall include all defenses of law or fact in his answer to the counterclaim * * *.

7. RCP 1.170(a) Compulsory Counterclaims—A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it

the person whose arrest is sought that it is the intention of arresting officer then and there to arrest and detain him. U.S.C.A. Const. Amend. 4.

3. Arrest ⊂=68

Although in certain circumstances an arrest is effectuated when vehicle in which person to be arrested is riding is stopped, detention for purpose of questioning occupants pursuant to a routine investigation is not a technical "arrest" which brings into play all the requirements of probable cause. U.S.C.A.Const. Amend. 4.

4. Searches and Seizures ⊂=7(10, 12)

Stopping a vehicle to interrogate the occupants pursuant to a routine investigation comes under the Fourth Amendment protections against unreasonable searches and seizures, and the act of an officer in stopping an automobile and approaching it while armed and in uniform constitutes "seizure" of the person, no matter how brief the detention period. U.S.C.A.Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

5. Arrest ⊂=63(4)

Simple good faith on part of officer is not enough to justify arrest without warrant; an objective standard must be used to test the reasonableness of the detention. U.S.C.A.Const. Amend. 4.

6. Arrest ⊂=63(4)

A vehicle may be stopped and its occupants detained if the officers have reasonable grounds for their actions, but a bare suspicion will not constitute reasonable grounds for the detention; the suspicion, if it is to be the grounds for the detention, must be founded upon a reasonable belief that a crime is being or has been committed by the occupants of the vehicle. U.S.C.A.Const. Amend. 4.

7. Criminal Law ⊂=412.2(2)

Officer's demand that defendant, whose automobile was stopped to enable officer to determine if defendant was driving while intoxicated, produce driver's license did not constitute a "custodial interrogation," and defendant was not entitled to warnings prior to arrest for failure to have driver's license in his possession.

8. Automobiles ⊂=349

Officer who arrested defendant for operating motor vehicle without driver's license in his possession had authority to take defendant into custody where defendant was driving automobile with out-of-state license plates and officer may have had reasonable grounds to believe defendant would not have appeared pursuant to a citation. U.S.C.A.Const. Amend. 4.

9. Arrest ⊂=71.1(8)

There must be a nexus between the offense and the object sought for a search conducted in connection with an arrest to be truly incident to it. U.S.C.A.Const. Amend. 4.

10. Arrest ⊂=71.1(6)

Arresting officer not only has right and duty to search arrested person for fruits and instrumentalities of the offense and for evidence as incident to the arrest, but he also has right to protect himself and to prevent possible escape by searching for weapons. U.S.C.A.Const. Amend. 4.

11. Arrest ⊂=71.1(6)

Even if arresting officer has no reasonable cause to believe suspect is armed, when suspect is taken into custody the officer has a right to search for any hidden weapon which could be used to effect escape. U.S.C.A.Const. Amend. 4.

12. Arrest ⊂=71.1(6)

Officer's protective search of arrested suspect for weapons must be limited in scope to a search for weapons. U.S.C.A. Const. Amend. 4.

3. Automobiles C=349

Although officer had reasonable grounds for stopping defendant's automobile to determine if defendant was driving while intoxicated and to arrest defendant for failure to have driver's license in his possession, there could be no valid search as an incident to the arrest, and although officer had right to conduct search of defendant's person for officer's protection and to prevent escape, officer exceeded scope of custodial search in removing cigarette package from defendant's coat pocket and inspecting the contents. U.S.C.A. Const. Amend. 4; F.S.A.Const. art. 1, § 9; F.S.A. § 901.21.

4. Automobiles C=349

Search of defendant after arrest for failure to have driver's license in his possession which went beyond scope of search for weapons was not lawful on theory that defendant would have been thoroughly searched at the police station in view of probability that defendant would have been released. U.S.C.A.Const. Amend. 4.

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Robert L. Shevin, Atty. Gen., Tallahassee, and John Paul Jones, Asst. Atty. Gen., West Palm Beach, for appellee.

CROSS, Chief Judge.

Appellant-defendant, James E. Gustafson, appeals an order of probation withholding adjudication of guilt in a non-jury trial on a charge of unlawful possession of marijuana. We reverse.

At approximately 1:30 a.m. on Sunday morning, January 12, 1969, appellant was driving an automobile in the City of Eau Gallie. A police officer of the city on routine patrol was following and observed appellant's vehicle weave slightly, the left wheels crossing into another traffic lane. The officer stopped the vehicle only "to find out why he had been driving that way, if he had been drinking or something," with no intention of making an arrest for reckless driving.

Upon stopping the vehicle, the officer asked for appellant's driver's license. Appellant informed the officer he was a student and had left his driver's license in the dormitory room at Melbourne. Appellant was then arrested for failure to have a driver's license in his possession, searched, placed in the patrol car and taken to the police station. A companion riding in the vehicle as a passenger was also searched.

During the search the officers took from appellant's coat pocket a cigarette package and proceeded to examine its contents. The examination revealed the existence of several home-made cigarettes. The officer then asked appellant if they were marijuana cigarettes, and the appellant ultimately replied that they were. Upon arrival at the police station, the patrolman delivered the cigarette package and its contents to one of the city's detective lieutenants, who examined the cigarettes and made a preliminary determination that the cigarettes contained marijuana. Appellant was then charged with possession of marijuana. He was subsequently advised of his constitutional rights.

By motions prior to trial and at the non-jury trial appellant by objections challenged the constitutionality of the arrest, the search, seizure, admissibility of the tangible evidence and statements, and the statute upon which the information was based. Needless to say, the motions and objections were denied. The trial court determined appellant was guilty, withheld adjudication of guilt and placed appellant on probation. Hence this appeal.

On appeal appellant raises six points: (1) that the initial stop and detention was unreasonable and thus unlawful under the fourth amendment; (2) that the officer failed to give Miranda warnings upon stopping the automobile, thus rendering all

statements and evidence obtained thereafter inadmissible; (3) that the officer had no authority to take appellant into custody for failure to have a driver's license in his possession; (4) that the officer had no authority to conduct a search of appellant's person incident to an arrest for a minor traffic violation; (5) that the evidence was insufficient to establish that the contents of the cigarettes were narcotic; and, (6) that the applicable statute cannot constitutionally proscribe the possession of botanical substances that are not narcotic.

In support of the first contention, appellant asserts that the initial "seizure" of appellant's person was without probable cause, and that any evidence discovered incident to the "illegal arrest" should have been suppressed.

The fourth amendment to the United States Constitution and section 12 of the Florida Declaration of Rights, F.S.A., secure the people against unreasonable searches and seizures and provide certain requirements for the issuance of a warrant. Traditionally, these provisions have been applied to arrests and searches and seizures, with the test of probable cause being applied where no warrant is issued.

[1, 2] In Florida an arrest has been defined as the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime. Essentially, four elements are required in an arrest: (1) a purpose or intention to effect an arrest under a real or pretended authority; (2) an actual or constructive seizure or detention of the person to be arrested by a person having present power to control the person arrested; (3) a communication by the arresting officer to the person whose arrest is sought, of an intention or purpose then and there to effect an arrest; and (4) an understanding by the person whose arrest is sought that it is the intention of the arresting officer then and there to arrest and detain him. Melton v. State, Fla. 1954, 75 So.2d 291.

[3] In certain circumstances an arrest is effectuated when the vehicle in which the person to be arrested is riding is stopped, since the officer has effectively interrupted and restricted his liberty of movement. Henry v. United States, 1959, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134. This rule has been applied where the arresting officer had probable cause to believe the driver of the vehicle was carrying moonshine, United States v. Davis, W.D. Pa.1967, 265 F.Supp. 358, and where an illegal U-turn was made in the officer's presence, United States v. Washington, D. C.1965, 249 F.Supp. 40.

Clearly, however, there are instances where a vehicle is stopped on a highway by an officer of the law where he does not have probable cause to make an arrest, and in fact, he does not intend to make an arrest unless he acquires additional information to warrant an arrest. Such a detention for the purpose of questioning the occupants pursuant to a routine investigation is not a technical "arrest" which brings into play all the requirements of probable cause. Rios v. United States, 1960, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (routine questioning when a car stopped at an intersection in a neighborhood which had a reputation for narcotics activity); Nicholson v. United States, 5 Cir. 1966, 355 F.2d 80; Rodgers v. United States, 8 Cir. 1966, 362 F.2d 358 (check for a stolen car). Lipton v. United States, 9 Cir. 1965, 348 F.2d 591 (momentary detention to check operator's license); Busby v. United States, 9 Cir.1961, 296 F.2d 328 (routine investigation pursuant to reliable information).

Florida courts have recognized use of detentions which fall short of technical arrests. Chance v. State, Fla.App.1967, 202 So.2d 825 (investigation of a liquor store robbery); Lowe v. State, Fla.App.1966, 191 So.2d 303 (investigation of robbery suspects). A license check evidently falls into this category. City of Miami v. Aronovitz, Fla.1959, 114 So.2d 784.

[4] Although a distinction is made from a formal arrest, stopping a vehicle to interrogate the occupants pursuant to a routine investigation still falls under fourth amendment protections against unreasonable searches and seizures. For this purpose, the act of an officer in stopping an automobile and approaching it while armed and in uniform constitutes a *seizure* of the person, no matter how brief the detention. Albeit for a short time, the liberty of the occupants of the car is restrained just as much as if the officer had made a formal arrest and then subsequently released the "arrested" individuals. A similar distinction was at issue in Terry v. Ohio, 1968, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889:

"It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."

In the opinion for the majority, Chief Justice Warren warned against drawing distinctions between types of police detentions which would "isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen." The fourth amendment was held to come into play as a limitation upon police conduct even if the officers stop short of a technical arrest.

Query: In light of the fourth amendment, may an officer stop and detain the occupants of an automobile for anything less than the probable cause required for arrests and searches?

[5] The constitutional prohibition against unreasonable searches and seizures makes no distinction between informal detention without cause and formal arrest without cause, but there is a difference between the "cause" required. Wilson v. Porter, 9 Cir. 1966, 361 F.2d 412. In Terry v. Ohio, supra, the court sought to balance the need to seize the person against the intrusion which it entails. The court held that in justifying the particular intrusion the officer must point to facts which together with rational inferences from them reasonably warrant the intrusion. Simple good faith on the part of the officer is not enough. An objective standard must be used to test the reasonableness of the detention:

"[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? • • • Anything less could invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." Terry v. Ohio, supra.

The test has also been stated as follows:

"But due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers would have had reasonable grounds for their actions. A *founded suspicion* [supplied] is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing." Wilson v. Porter, supra.

[6] We adhere to the rule that a vehicle may be stopped and its occupants detained if the officers have reasonable grounds for their actions. State v. Padilla, Fla.App.1970, 235 So.2d 309. But a bare suspicion will not constitute reasonable grounds for the detention. Kersey v. State, Fla.1952, 58 So.2d 155; Carter v. State, Fla.App.1967, 199 So.2d 324. The suspicion, if it is to be the grounds for the detention, must be founded upon a reasonable belief that a crime is being or has

been committed by the occupants of the vehicle. Other tests may apply if the detention is merely for questioning. See State v. Padilla, supra.

Turning to the case at bar, we ascertain from the record that the only basis for the initial detention of appellant was that the officer suspected that he was intoxicated. This suspicion was based on the fact that the left wheels of the automobile veered into the other traffic lane.

Whether weaving back and forth on the highway constitutes reckless driving has been discussed at length by the Florida Supreme Court. Brown v. State, Fla.1956, 91 So.2d 175; Collins v. State, Fla.1953, 65 So.2d 61. In the instant case, however, the officer admitted and the trial court determined that the officer lacked sufficient grounds for arresting appellant for reckless driving.

In the briefs both parties argue whether the officer had a right to stop appellant to check his driver's license, but our reading of the record indicates that the sole reason for stopping the automobile was to determine if appellant was driving while intoxicated. Our determination, then, is whether the officer had reasonable grounds to stop appellant's automobile on that basis.

Drunken drivers are a dangerous menace to highway traffic. Certainly, where a vehicle veers from side to side of the road and crosses the line which delineates its proper lane, where the vehicle is moving at a very slow rate of speed, and where this occurs in the early hours of the morning, we cannot say that an officer does not have reasonable grounds for believing the driver to be intoxicated and thus violating the law in the presence of the officer. There is no unreasonable seizure of the driver's person when he is stopped and momentarily detained while the officer investigates his suspicion. Thus, the appellant was lawfully detained, and the officer was authorized to ask appellant as driver of the vehicle to produce his driver's license.

[7] As to appellant's second contention, Miranda warnings were not necessary before the officer demanded that appellant produce his driver's license. This was not a custodial interrogation; Miranda does not require warnings prior to arrest. Jennings v. United States, 5 Cir. 1968, 391 F.2d 512.

Appellant's third contention is that the officer had no authority to take appellant into custody for failure to have a driver's license in possession.

[8] Section 186.51(1) of the Model Traffic Ordinance adopted by the City of Fau Gallie provides that a violator of a traffic ordinance may be kept in custody or released on bail where it appears doubtful that he will appear pursuant to a written citation. In the instant case, there is no reason why the officer should not have taken appellant to the police station for formal charging or to set bail. Appellant was driving an automobile with an out-of-state license plate, and the arresting officer may have had reasonable grounds to believe appellant would not have appeared pursuant to a citation. Although it may not have been the most advisable course to follow, the arrest and taking into custody of appellant was not illegal.

Appellant's fourth contention requires a more detailed inquiry. Having arrested appellant for failure to have a driver's license in his possession, the officer then proceeded to search his person, in the course of which the officer found a cigarette package in appellant's coat pocket containing marijuana cigarettes. Appellant contends the search of his person was unreasonable. The issue for our determination is whether the search was reasonable as *incident to the arrest* for a traffic violation.

Unreasonable searches and seizures are prohibited by the fourth amendment. United States v. Rabinowitz, 1950, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed.2d 653. Normally, the right to privacy yields to the

right to search only upon the determination of reasonableness by a judicial officer. Johnson v. United States, 1948, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436. There are a number of recognized exceptions to the requirement of a warrant, most notably the plain sight exception (Marron v. United States, 1927, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231), search of a vehicle when an officer has probable cause to believe it is carrying contraband (Carroll v. United States, 1925, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543), and search of the person and immediate surroundings as an incident to an arrest. (Harris v. United States, 1947, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399).

The authority of an arresting officer to search the person being arrested is embodied in Section 901.21, Florida Statutes, F.S.A.[1] Nevertheless, the Florida Supreme Court has determined incident searches to be unreasonable where a person is arrested for an alleged traffic violation only as a pretext for a warrantless search. Graham v. State, Fla.1952, 60 So.2d 186. Such searches are considered to be merely exploratory in nature and not truly incident to the arrest, since the search is the primary purpose of the arrest. Riddlehoover v. State, Fla.App.1967, 198 So.2d 651; Chapman v. State, Fla.App.1963, 158 So.2d 578.

In the case sub judice we have determined the officer had reasonable grounds for stopping appellant's automobile, and upon its being stopped to ask appellant to produce his driver's license, and upon appellant's failure to do so to arrest appellant for failure to have a driver's license in his possession. The arrest of the appellant in the instant case certainly was not a mere pretext for a search.

We therefore now turn to the issue of the reasonableness of the search incident to a bona fide traffic arrest.

As early as 1921, a method of testing the reasonableness of searches and seizures was set forth by the Florida Supreme Court:

"What is a reasonable or valid search or seizure is to be determined by the courts upon due consideration of the circumstances and manner in which the search or seizure is made by the officer. No search or seizure is permissible under the law without a proper warrant duly issued, except as a reasonable search and seizure may be allowed by law as an incident to a lawful arrest. Where an arrest without a warrant is allowed by law, as for an offense being committed or threatened in the presence of an officer authorized by law to make arrests for such offense, a reasonable search and seizure that is *properly* incident to a lawful arrest may be made in a reasonable and proper manner by the officer making the lawful arrest; *but the search and seizure should not be inappropriate to the reasonable requirements for making effective a lawful arrest.*" Haile v.

1. *F.S. 901.21 F.S.A. Search of person arrested; admission in evidence of property found.*

(1) When any sheriff, deputy sheriff, or other police officer in this state shall lawfully arrest any person, the officer making such arrest, or his assistant, may search the person so arrested, and if such search reveals the violation of any law, the officer shall hold such person upon a charge of violating the law, the violation of which has been so revealed, and anything found on such person or in his possession which tends to show the guilt of such person of the violation of law shall be admitted in evidence upon a trial in which such violation is charged, and such violation shall be deemed to be one committed in the presence of the officer.

(2) When any sheriff, deputy sheriff, or other police officer of this state, shall lawfully arrest any person for the violation of the road or speed laws, or for reckless driving, or driving while drunk or intoxicated, and shall find upon making such arrest that such person has unlawfully in his possession or control, concealed weapons, intoxicating liquors or stolen or embezzled property, contrary to law, it shall be deemed to be a violation of the law committed in the presence of the officer so making the arrest
• • •

Gardner, 1921, 82 Fla. 355, 91 So. 376; State ex rel. Stillman v. Merritt, 1924, 86 Fla. 164, 99 So. 230. (Emphasis added.)

See also 3 Fla.Jur., Arrest § 37. Subsequently, Florida courts in citing the above cases (Haile v. Gardner and Stillman v. Merritt), the italicized portions above emphasized were omitted, and the test for reasonableness became merely a determination of whether the search was incident to a lawful arrest. E. g., Italiano et al. v. State, 1940, 141 Fla. 249, 193 So. 48; Self v. State, Fla.1957, 98 So.2d 333. The decisions still iterate that the determination of the reasonableness of the search must be made in light of the surrounding circumstances and the manner in which the search was made, Range v. State, Fla. App.1963, 156 So.2d 534; Herring v. State, Fla.App.1960, 121 So.2d 807. But cases are legion in applying a categorical test of whether a lawful arrest preceded the search with little or no indication that other relevant circumstances were taken into consideration.

This categorical approach has been used to uphold searches incident to arrests for public drunkenness (Farmer v. State, Fla. App.1968, 208 So.2d 266), vagrancy (Donar v. State, Fla.App.1970, 236 So.2d 145; Schuster v. State, Fla.App.1970, 235 So.2d 30; Hanks v. State, Fla.App.1967, 195 So. 2d 49), and minor traffic violations (Self v. State, supra; Smith v. State, Fla.App. 1963, 155 So.2d 826, cert. dismissed, Fla., 167 So.2d 225).[2]

We will not compound the error nor blindly follow the categorical rule that a search incident to *any* arrest for the commission of *any* crime is lawful under the fourth amendment of the United States Constitution and Florida's Declaration of Rights. If the fourth amendment is to be meaningful in protecting the privacy of our citizens, courts must scrutinize searches and seizures allegedly coming within the exceptions to the requirement of a warrant. Amador-Gonzalez v. United States, 5 Cir. 1968, 391 F.2d 308. We subscribe to the view expressed in People v. Watkins, 1960, 19 Ill.2d 11, 166 N.E.2d 433:

> "The critical issue in each case must be whether the situation that confronted the officer justified the search. That question cannot be determined by an indiscriminate application of legal concepts that were evolved to meet quite different problems. A uniform rule permitting a search in every case of a valid arrest, even for minor traffic violations, would greatly simplify our task and that of law enforcement officers. But such an approach would preclude consideration of the reasonableness of any particular search, and so would take away the protection that the constitution is designed to provide."

Our determination of the reasonableness of the search in the case sub judice leads to an examination of the basis of the general rule that a search may be conducted as an incident to a lawful arrest. In that regard, one of our federal courts stated:

> "If a search for evidence of crime is justified as incident to an arrest, it must be because the evidence relates to the

2. It is important to describe the circumstances under which it was held lawful to search incident to an arrest for a minor traffic violation. In Self v. State, supra, a truck was stopped for driving with a defective taillight, and the beam of the patrolman's flashlight through the panels of the trunk revealed moonshine equipment. The canvas cover was removed voluntarily by the driver. The court held that the search was reasonable and proper under the circumstances as incident to a lawful arrest.

In Smith v. State, supra, the appellant was arrested because it was his fourth traffic violation, and prior to being taken to the police station for formal charging he was searched. This was held to be a reasonable incidental search. Concurring specially, however, Judge White emphasized that the law does not give officers unqualified authority to conduct a search after stopping a driver for a routine license check, but because there was no subterfuge, he concurred in the result.

crime for which the arrest is made * * * and not to some other charge the police had hopes of being able to bring against the person arrested." Jack v. United States, 9 Cir. 1967, 387 F.2d 471.

A search for fruits of the crime or for evidence has been upheld as properly incident to a lawful arrest in numerous Florida decisions.[3]

Query: May the search be for evidence of *any* crime, or is it limited to fruits of the crime for which the person was arrested?

Section 901.21, Florida Statutes, F.S.A., seems to indicate that a search is permissible to discover evidence of any crime. However, in State v. Aiken, Fla.App.1969, 228 So.2d 442, we determined the search to be reasonable as it related to the crime for which the arrest was made. In Brown v. State, Fla.1950, 46 So.2d 479, the scope of the search was also limited to whether the articles searched for were being utilized in perpetrating a crime for which the arrest was made. To so limit the scope of the search would require the search and seizure to be properly incident to a lawful arrest as thus set forth in the earlier Florida Supreme Court decisions.

This more restrictive interpretation of the proper scope of a search incident to arrest is in harmony with the development of the incidental search at common law. Searches incident to an arrest were allowed at common law if the property was likely to afford material evidence for the prosecution of the offender with respect to the crime for which he was arrested. Note, Searches of the Person Incident to Lawful Arrest, 69 Col.L.Rev. 866 (1969).

The language of the fourth amendment implies that a search will comply with its protective requirements only if the scope of the search is no broader than legitimate governmental objectives justify. If searches are permitted on less evidence than is required for the usual search, the intrusiveness of searches must also be more limited. This approach is the result of the acceptance of the concept of variable probable cause, which means that the probable cause necessary for the search varies with the situation. Note, Scope, Limitations for Searches Incident to Arrest, 78 Yale L.J. 433 (1969).

[9] There must be a nexus between the offense and the object sought for a search conducted in connection with an arrest to be truly *incident* to it. There are Florida cases which support this conclusion. In Courington v. State, Fla.1954, 74 So.2d 652, the Florida Supreme Court determined that "the search of the trunk of appellant's car was not appropriately incident to making effective a lawful arrest for driving while intoxicated." The court similarly determined in Slater v. State, Fla.1956, 90 So.2d 453, that the search of an automobile revealing lottery tickets was not incidental to an arrest for a traffic violation. See also Brown v. State, Fla.1956, 91 So.2d 175; State v. Simmons, Fla.1956, 85 So.2d 879; Collins et al. v. State, Fla.1953, 65 So.2d 61.

Determining the reasonableness of a search by examining the rational nexus with the arrest is much more desirable than examining the motive of the arresting officer. Amador-Gonzalez v. United States, supra. The bad faith test used in sham arrest cases leaves room for abuse where the arrest is clearly proper and no inference of bad faith is justified. Merely because the officer had a bona fide motive in searching the arrested person does not automatically mean that the search was *reasonable* under the fourth amendment. In arrest situations, we conclude that the

3. Fletcher v. State, Fla.1953, 65 So.2d 845; Gibson v. State, Fla.App.1965, 180 So.2d 685; Chippas v. State, Fla.App. 1965, 180 So.2d 355; Gray v. State, Fla. App.1965, 177 So.2d 868; Lyons v. Town of Lake Park, Fla.App.1963, 153 So. 2d 21; Cameron v. State, Fla.App.1959, 112 So.2d 864; Bozeman v. State, Fla. App.1958, 102 So.2d 648.

only effective means of determining reasonableness is to examine whether the search was properly incident to the arrest, i. e., whether a nexus existed between the arrest and the articles sought.

The true value of this test comes to light when applied to traffic arrest situations. With the exception of driving while intoxicated (where a search for open liquor bottles is reasonable), there are no fruits or instrumentalities of the crimes which comprise traffic law violations. A search incident thereto bears no causal relation to the types of events for which the accused was apprehended. 1 Varon, Searches, Seizures and Immunities 203 (1961). It would follow, therefore, that most searches and seizures following an arrest for a traffic violation are not properly incident thereto and therefore are unreasonable and prohibited by the fourth amendment.

Some authorities have asserted that a search following a traffic arrest is always unlawful and that there are no exceptions. Sobel, Search and Seizure 119 (1964). To state the rule in such unequivocal terms is to again adopt a categorical approach to search and seizure questions. We emphasize that we reject such an approach, since each situation must be judged in light of the circumstances presented, and that hard and fast rules interfere with a proper determination. While most searches following an arrest for a traffic violation will undoubtedly be improper, we do not preclude the possible existence of other circumstances that would make the search and seizure reasonable.

[10] There is still another aspect of traffic arrests which must be considered. It is widely recognized that an arresting officer not only has the right and duty to search the arrested person for fruits and instrumentalities of the offense and for evidence as incident to the arrest, but he also has the right to protect himself and to prevent possible escape by searching for weapons. This is normally included with the other circumstances discussed above as "incident" to a lawful arrest. Green v. State, Fla.App.1966, 191 So.2d 607; 3 Fla. Jur., Arrest § 37; 4 Wharton's Criminal Law and Procedure § 1538. For the purposes of our discussion here, however, we choose to consider this justification for a search separate and apart from searches incident to an arrest.

[11] It is not the arrest which gives the officer the authority to make a protective search, but rather reasonable cause to believe the suspect is armed. Further, even if there is no reasonable cause to believe the suspect is armed, when he is taken into custody the officer has a right to search for any hidden weapon which could be used against him to effect escape. Nixon v. State, Fla.App.1965, 178 So.2d 620. Under the concept of incidental search as discussed above, then, a protective search is not actually "incident" to the arrest.

Even with an arrest for a traffic violation, the officer may have reason to conduct a protective search of the person arrested. Some courts have indicated that this is the only justification for a search in these circumstances. State v. Coles, 1969, 20 Ohio Misc. 12, 249 N.E.2d 553; Ciulla v. State, Tex.Civ.App.1968, 434 S.W.2d 948.

[12] Once the search is initially justified, it must be reasonably limited in scope to the circumstances which justified the search in the first place. Terry v. Ohio, supra. The mere fact of the arrest does not give to the officer an absolute right to search the vehicle or the occupants indiscriminately. Lane v. Commonwealth, Ky. 1964, 386 S.W.2d 743, 10 A.L.R.3d 948. The search must be limited to a search for *weapons*, which normally entails only "patting down" the suspect.

[13] We turn now to examining the search in the case at bar in light of the law as we have discussed it.

Appellant was initially stopped and detained on suspicion of driving while intoxi-

cated, but he was arrested for failure to have in his possession a valid driver's license. It was for this offense that he was to be taken to the police station to be formally charged.

Under the circumstances presented in this case, there could have been no valid search as an incident to the arrest. There were no instrumentalities of the crime except the car itself, no fruits of the traffic offense and no evidence to be preserved for trial. Any search conducted solely as an incident to the arrest was unreasonable and therefore in violation of the fourth amendment and of the Florida Declaration of Rights.

When the officer determined to arrest appellant and to place him in the squad car to be taken to the police station, he had a right to conduct a custodial search of appellant's person for his own protection and to prevent escape. An officer cannot be expected to place a suspect in the rear seat of his squad car without first searching him for weapons which might be used against him en route to the station house.

The custodial search is limited to weapons and instrumentalities for escape. In the instant case the officer removed a cigarette package from appellant's coat pocket and inspected the contents. Surely he did not expect to find a dangerous weapon inside the small, light cigarette package. We do not require the arresting officer to close his eyes to evidence of other crimes which he may discover in the course of the search, but we do require the officer to limit the scope of his search to one for weapons or instrumentalities of escape. The only reasonable conclusion to be drawn from the officer's conduct is that he was searching for something other than a weapon, and under these circumstances such a general search is unwarranted and unlawful. The arrest was not made as a pretext for the search; nevertheless, to allow the search to go beyond a pat-down for weapons would be to circumvent the rights guaranteed by the fourth amendment of the United States Constitution.

[14] The argument asserted by the state that the search was lawful, since appellant would have been thoroughly searched at the police station, is without merit. The officers at the police station would have had no right to search appellant unless he was to have been incarcerated. The probability that appellant would be issued a citation or notice or released on bail or on his own recognizance is too great to allow the arresting officer to conduct the search at the scene of the arrest. The search is not to be allowed until the circumstances are such that it is reasonable. A search that may become reasonable at a later time may not be made prematurely.

Since the search was unlawful, the evidence seized should have been suppressed.

Due to disposition of the case, it is not necessary to treat the remaining two points raised by appellant.

Accordingly, the order of probation is reversed and the cause remanded with directions to discharge the appellant from further prosecution under Information F 69-33.

Reversed and remanded, with directions.

LEE, THOMAS E., Jr., Associate Judge, concurs.

REED, J., concurs in conclusion.